STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HARALABOS MANETAS,

Defendant-Appellant.

UNPUBLISHED
July 7, 1998

No. 198568
Jackson Circuit Court
LC No. 92-061127 FC

Before: Jansen, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of solicitation to commit murder, MCL 750.157b(2); MSA 28.354(2)(2), and being an habitual offender, second offense, MCL 769.10; MSA 28.1082. The trial court sentenced defendant to twenty-five to forty years' imprisonment, to run consecutively to a sentence he was serving at the time of the offense. He appeals by right his conviction. We affirm.

While serving a prison term for a prior conviction, defendant asked a fellow prisoner, Anderson, to help him find someone to kill the judge who had presided at his first trial. Anderson notified the authorities and cooperated in presenting an undercover police officer to defendant. The officer, who was wearing a hidden recording device, met with defendant at the prison. Defendant asked the undercover officer to kill the judge in exchange for a sum of money. The officer instructed defendant to send him a letter with all the necessary information, including the agreed upon down payment. Anderson helped defendant write the letter, because defendant could not write in English, but defendant never sent the letter to the undercover officer. When Anderson learned that defendant was soliciting another person to kill the judge, he informed the authorities, and defendant was arrested.

I

Defendant first claims that the arresting officers lacked probable cause to arrest where his arrest was based on a letter that was never mailed. The record indicates, however, that defendant's arrest was not based on the letter but on his solicitation of the undercover officer to kill the judge, contrary to MCL 750.157b(2); MSA 28.354(2)(2). *People v Vandelinder*, 192 Mich App 447, 450-451; 481

NW2d 787 (1992). Defendant also contends that the search of his prison footlocker and the subsequent discovery of the letter violated his Fourth Amendment rights against unreasonable searches and seizures. We disagree. The Fourth Amendment's protection does not apply to prisoners. *Hudson v Palmer*, 468 US 517, 525-526; 104 S Ct 3194; 82 L Ed 2d 393 (1984); *People v Phillips*, 219 Mich App 159, 161; 555 NW2d 742 (1996). As a prisoner, defendant had no reasonable expectation of privacy. *People v Marsh*, 156 Mich App 831, 835; 402 NW2d 100 (1986).

II

Next, we find that the magistrate did not abuse his discretion in binding defendant over for trial. See *People v Whipple*, 202 Mich App 428, 431; 509 NW2d 837 (1993). The evidence at the preliminary examination was sufficient to establish each element of solicitation to commit murder. *Vandelinder*, *supra* at 450-451.

III

Defendant further claims that the trial court abused its discretion in denying his post-trial motion for a polygraph test and that defense counsel was ineffective for not requesting a polygraph test before trial. Defendant has waived review of this issue, however, by failing to provide this Court with a transcript of the hearing on his motion. *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 654; 517 NW2d 864 (1994); *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 540; 506 NW2d 890 (1993). Nevertheless, because polygraph results are not admissible at trial, there is no basis for believing that the court would have granted a pretrial motion for a polygraph test. Defense counsel was not required to make a futile motion. *People v Barbara*, 400 Mich 352, 364; 255 NW2d 171 (1977); *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

IV

Defendant next contends that the prosecutor withheld exculpatory evidence regarding the fact that just before he was arrested, defendant abandoned his offer to have the undercover officer kill the judge and sought another means of accomplishing this task. We disagree. First, abandonment is not a defense to solicitation to commit murder. MCL 750.157b(4); MSA 28.354(2)(4). Rather, the crime is committed when the solicitor purposely seeks to have someone killed and tries to engage someone to do the killing. *Vanderlinder*, *supra* at 450. Solicitation is complete when the solicitation is made. A contingency in the plan affects whether the victim will be murdered, but it does not change the solicitor's intent that the victim be murdered. *Vandelinder*, *supra* at 450-451. Thus, evidence of abandonment is not exculpatory. Second, the record does not support defendant's claim that evidence was withheld. Rather, the record indicates that defendant was aware of the evidence in question as early as the preliminary examination.

We further find that the trial court did not abuse its discretion in denying defendant's late motion to produce two character witnesses, each of whom were fellow inmates at the prison. See *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997); *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). Defendant did not request the testimony of these inmates to rebut the

undercover officer's testimony, and there is no evidence that defendant based his decision to testify on the court's denial of his motion to add these witnesses.

V

Next, where it was disclosed at trial that all of defendant's visitors at the prison had been interviewed, defendant claims that the prosecutor should have provided him with the notes from the interviews so he could have called the witnesses at his entrapment hearing. We believe that the prosecutor complied with MCR 6.201(A) and (B). The prosecutor was not required, absent a request, to produce the names of all people interviewed or to produce notes of those interviews unless the prosecutor intended to call them as witnesses. See, generally, *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 8, 13 (1995). Moreover, the prosecutor had no intention of calling defendant's visitors as witnesses, MCR 6.201(A)(2).

Additionally, the trial court did not abuse its discretion in denying defendant's entrapment motion. There is no indication in the record that defendant asked the court to inquire into the security procedures at Riverside Prison in order to impeach Anderson's testimony. Furthermore, we do not believe that the court clearly erred by failing to find that Anderson lied about who initiated the first contact regarding defendant's plan. The trial court heard audio recordings of conversations between Anderson and defendant's first attorney, in which Anderson claimed that prison authorities initiated the investigation, as well as Anderson's contradictory testimony that he initiated the contact and that he lied to defendant's attorney to protect himself from defendant. The court also heard testimony from the undercover officer and the recorded conversation between defendant and the undercover officer. The deputy warden also testified that Anderson contacted him, and Anderson's note to the warden was entered into evidence. Moreover, the FBI agent and the deputy warden both testified about their contacts with Anderson. Thus, the trial court had sufficient evidence upon which to decide the entrapment issue and to determine credibility, which is a question for the trier of fact. See *People v Smith*, 158 Mich App 220, 230; 405 NW2d 156 (1987).

VI

Next, defendant asserts that the record is unclear whether he was sentenced as an habitual offender or pursuant to the sentencing guidelines' recommendation. This claim is without merit. The judgment of sentence reflects that defendant was sentenced as an habitual offender, and both the prosecutor and defense counsel remarked at sentencing that the guidelines did not apply. Although the sentencing court did not expressly state that it was sentencing defendant as an habitual offender, the record does not reflect any confusion on this issue.

We also conclude that defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender, *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990), and the trial court did not abuse its sentencing discretion, *People v Cervantes*, 448 Mich 620, 626-627; 532 NW2d 831 (1995). Also, defendant was not entitled to sentence credit for time served. MCL 769.11b; MSA 28.1083(2); *People v Adkins*, 433 Mich 732, 742; 449 NW2d 400 (1989); *People v Prieskorn*, 424 Mich 327, 344; 381 NW2d 646 (1985).

VII

Defendant's claim that this case should have been dismissed for violation of the 180-day rule is without merit because MCL 780.131; MSA 28.969(1) does not apply to a criminal offense committed by an inmate while incarcerated in a correctional facility or while on escape. *People v Smith*, 438 Mich 715, 718; 475 NW2d 333 (1991); *People v Connor*, 209 Mich App 419, 423-424; 531 NW2d 734 (1995). Also, defendant was not prejudiced because of the suspension of his original attorney. The record indicates that defendant's original attorney withdrew from representation on the day of the mistrial, and defendant was represented by a different attorney after that date.

VIII

The trial court also did not err in failing to give an instruction on attempted solicitation where such an instruction was not requested. MCR 2.516(D)(2)(c); MCL 768.29; MSA 1052. Moreover, there is no crime of attempt to solicit. See *Vandelinder, supra* at 454.

IX

Defendant waived his right to raise a double jeopardy claim when he agreed to the declaration of the mistrial. *People v Dawson*, 431 Mich 234, 236; 427 NW2d 886 (1988). Defendant's claim that the prosecutor "goaded" him into agreeing to the mistrial is not supported by the record, nor has defendant demonstrated any prosecutorial misconduct. *People v Tracey*, 221 Mich App 321, 326; 561 NW2d 133 (1997).

The trial court also did not abuse its discretion in denying defendant's motion for mistrial at the second trial. The crimes the prosecutor referred to at trial had already been placed into evidence through defendant's testimony and statements to the undercover officer, and the court's curative instruction was sufficient to cure any alleged prejudice arising from the prosecutor's remarks. *People v Hall*, 396 Mich 650, 655; 242 NW2d 377 (1976); see *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996);

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Moreover, defendant's conclusory allegations of ineffective assistance of counsel are not supported by the record. Defendant failed to demonstrate that his attorney's performance fell below an objective standard of reasonableness. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

XI

Defendant's constitutional challenges to the solicitation statute, MCL 750.157b; MSA 28.354(2), are also without merit. See *People v White*, 212 Mich App 298, 308-309; 536 NW2d 876 (1995). Defendant's reliance on *People v Rehkopf*, 422 Mich 198; 370 NW2d 296 (1985), is misplaced because the solicitation statute was amended after *Rehkopf* was decided. As amended, the statute makes it clear that criminal responsibility does not depend on whether the solicited

crime is completed. Moreover, the statute does not regulate protected speech. See *Watts v United States*, 394 US 705, 707-708; 89 S Ct 1399; 22 L Ed 2d 664 (1969); *United States v Snelenberger*, 24 F3d 799, 803 (CA 6, 1994).

Finally, defendant's claim that MCL 780.131(2); MSA 28.969(1)(2), is unconstitutional is likewise without merit. Defendant's reliance on *People v Woodruff*, 414 Mich 130; 323 NW2d 923 (1982), for the proposition that the exception carved out of the 180-day rule unconstitutionally creates an invalid classification is misplaced in light of the determination in *People v Smith*, 438 Mich 715, 717-718; 475 NW2d 333 (1991), that *Woodruff* was incorrectly decided.

We affirm.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Peter D. O'Connell